UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: PACIFIC FERTILITY CENTER LITIGATION

This Document Relates to:

No. 3:20-cv-05047 (A.J. and N.J.)
No. 3:20-cv-04978 (L.E. and L.F.)
No. 3:20-cv-05030 (M.C. and M.D.)
No. 3:20-cv-04996 (O.E.)
No. 3:20-cv-05041 (Y.C. and Y.D)

Case No. 18-cv-01586-JSC

ORDER RE: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Re: Dkt. No. 908

Plaintiffs prevailed at trial on their product liability and failure to recall claims against Chart Industries and judgment was entered in their favor on August 13, 2021. There are over 130 other consolidated related cases which are a part of the *In re: Pacific Fertility Litigation*.[1] (Dkt. No. 554.[2]) The next five cases are set for trial January 31, 2022. (Dkt. No. 620.) As part of their pre-trial filings, these Plaintiffs have moved for partial summary judgment seeking to bar Chart from relitigating the cause of the underlying incident on the grounds that the jury's findings from the prior trial should be given preclusive effect. (Dkt. No. 908.) Having carefully considered the parties' briefs and the relevant legal authority, and having had the benefit of oral argument on November 4, 2021, the Court DENIES Plaintiffs' motion for partial summary judgment. Plaintiffs have not shown as a matter of law that the jury's findings and the subsequent judgment are final for purposes of issue preclusion.

[1] All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 11, 19, 553, 615, 618, 893, 894, 919, 920, 934, 969, 981.)

[2] Record Citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the document.

BACKGROUND

Plaintiffs in *In re: Pacific Fertility Litigation* all obtained fertility services from Pacific Fertility Center (PFC)[3], and in particular, as relevant here, cryopreservation of their eggs and embryos. On March 4, 2018, PFC's laboratory director, Dr. Joseph Conaghan, discovered that Tank 4 which contained 2,500 embryos and 1,500 eggs—including Plaintiffs' eggs and embryos—had lost liquid nitrogen.

As a result of this incident, Plaintiffs A.B., C.D., E.F., G.H., and I.J. filed a putative class action against Chart alleging manufacturing and design defects, as well as negligent failure to recall.[4] The Court denied class certification and Plaintiffs A.B., C.D., E.F., G.H., and I.J.'s claims proceeded to trial in May and June 2021. (Dkt. Nos. 473, 819, 820, 823, 825, 831, 836, 839, 845, 848, 855, 857.) On June 10, 2021, the jury returned a verdict in Plaintiffs' favor on all claims. (Dkt. No. 858.) On August 13, 2021, the Court granted Plaintiffs' motion for entry of judgment under Rule 54(b) and the Clerk entered judgment in their favor. (Dkt. Nos. 901, 902.) On November 8, 2021, the Court denied Chart's motion for a new trial and motion for judgment as a matter of law under Rule 50(b). (Dkt. No. 995.)

The next set of Plaintiffs' claims—those of Plaintiffs A.J., N.J., L.E., L.F., M.C., M.D., O.E., Y.C., and Y.D (hereafter "Plaintiffs")—are set for trial on January 31, 2022. In connection with that trial, the parties have filed motions for summary judgment and motions to exclude expert testimony. (Dkt. Nos. 905, 906, 908, 910.)

DISCUSSION

Plaintiffs contend that certain factual issues were resolved at the jury trial of Plaintiffs A.B., C.D., E.F., G.H., and I.J.'s claims and that the jury's findings on these issues should be given preclusive effect under the doctrine of collateral estoppel, otherwise known as issue preclusion.[5] In particular, Plaintiffs seek to preclude Chart from relitigating:

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[3] The Court uses PFC throughout this Order to refer to Pacific Fertility Center and all its associated entities and medical professionals, including Prelude Fertility, Inc., and Pacific MSO, LLC

[4] The PFC entities were also named as defendants but the claims as to them have been compelled to arbitration.

[5] Under California law, "the doctrine of res judicata [traditionally] defines the preclusive effect of

(1) Whether Tank 4 was misused or modified after it left Chart's possession;

(2) Whether Tank 4 contained a manufacturing defect when it left Chart's possession;

(3) Whether a manufacturing defect was a substantial factor in causing the March 4th Incident;

(4) Whether Tank 4 contained a design defect when it left Chart's possession;

(5) Whether a design defect was a substantial factor in causing the March 4th incident;

(6) Whether Chart negligently failed to recall or retrofit Tank 4's controller;

(7) Whether the failure to recall or retrofit was a substantial factor in causing the March 4th incident;

(8) What percentage of responsibility Chart has for the March 4th incident.

(Dkt. No. 908 at 2.)

A. Issue Preclusion

Federal common law governs a federal court's determination of the preclusive effect of a federal judgment. *See Taylor v. Sturgell*, 553 U.S. 880 (2008). Under federal common law, what preclusion rule applies depends on whether the federal judgment is based upon federal question or diversity jurisdiction. *Id.* at 891 & n.4. If the judgment is based upon federal question jurisdiction, federal courts apply the uniform federal rules of preclusion. *Id*. at 891. If the judgment is based upon diversity jurisdiction, federal courts apply the law of the state where the "federal diversity court sits." *Daewoo Elecs. Am. Inc. v. Opta Corp*., 875 F.3d 1241, 1247 (9th Cir. 2017); *see also Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) ("[F]ederal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity"). That is, the "same claim-preclusive rule (the state rule) appl[ies] whether the dismissal has been ordered by a state or a federal court." *Semtek*, 531 U.S. at 508.

The Court's judgment to which Plaintiffs seek to apply issue preclusion is based upon diversity jurisdiction. (Dkt. No. 578-1 at ¶ 9.) Therefore, in deciding whether issue preclusion

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a judgment in a prior proceeding in terms of both claim preclusion (at common law, merger and bar) and issue preclusion (collateral estoppel)." *Johnson v. GlaxoSmithKline, Inc.*, 166 Cal. App. 4th 1497, 1507 n.5 (2008), as modified on denial of reh'g (Oct. 14, 2008) (internal citations omitted). The United States Supreme Court uses "the terms 'claim preclusion' and 'issue preclusion,' rather than 'res judicata' and 'collateral estoppel.'" *Id*. (citing *Taylor v. Sturgell*, 553 U.S. 880, 892, n.5 (2008).) The Court will use the term issue preclusion in this Order. Claim preclusion is not at issue.

applies, the Court applies California preclusion law. *Taylor*, 553 U.S. at 891 n.4; *Semtek*, 531 U.S at 508. Under California law, issue preclusion applies where:

> (1) the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;
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> (2) the issue to be precluded must have been actually litigated in the former proceeding;
>
> (3) the issue to be precluded must have been necessarily decided in the former proceeding;
>
> (4) the decision in the former proceeding must be final and on the merits;
>
> (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding; and
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> (6) application of issue preclusion must be consistent with the public policies of preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.

Rodriguez v. City of San Jose, 930 F.3d 1123, 1131–32 (9th Cir. 2019) (quoting *Lucido v. Superior Court*, 51 Cal.3d 335, 341-43 (1990) (internal citation and quotation marks omitted)). Plaintiffs contend that all requirements are met as a matter of law. Chart responds that issue preclusion is improper because the judgment in the first trial is not final (Requirement No. 4), and even apart from the lack of finality, it would be counter to the public policy of "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation" to give preclusive effect to the first jury's findings" (Requirement No. 6). (Dkt. No. 951 (quoting *Rodriguez*, 930 F.3d at 1131).

Under California preclusion law, a judgment is not final "while open to direct attack, e.g., by appeal." *See Abelson v. Nat'l Union Fire Ins. Co*., 28 Cal. App. 4th 776, 787 (1994); *see also Sosa v. DIRECTV, Inc*., 437 F.3d 923, 928 (9th Cir. 2006) ("Under California law, ... a judgment is not final for purposes of res judicata during the pendency of and until the resolution of an appeal.") (internal citation omitted). Here, it is undisputed that all appeals from the judgment have not been exhausted and therefore under California law issue preclusion does not yet apply. *See Callahan v. Peopleconnect, Inc.*, 2021 WL 5050079, at *4 (N.D. Cal. Nov. 1, 2021) (California federal court refusing to apply issue preclusion to California federal diversity jurisdiction

judgment because the judgment is on appeal and therefore not final for purposes of California law of issue preclusion). Summary judgment must therefore be denied.

Plaintiffs' insistence that in California the federal rule of finality for federal question jurisdiction judgments applies to federal diversity jurisdiction judgments is unpersuasive. Under federal common law, a federal question jurisdiction judgment is final for preclusion purposes upon the trial court's entry of final judgment. *Sosa*, 437 F.3d at 927. Thus, under the federal question preclusion rule, the judgment entered by this Court would satisfy the finality requirement for the application of issue preclusion. But to apply the federal question judgment preclusion rule would contradict the Supreme Court's holding that the preclusive effect of federal diversity jurisdiction judgments be determined by state law, and, in particular, the Court's command that the "same claim-preclusive rule (the state rule) appl[ies] whether the dismissal has been ordered by a state or a federal court." *Semtek*, 531 U.S. at 508. Plaintiffs are asking this Court to apply a different preclusive rule to a dismissal ordered by a state court than a dismissal ordered by a federal court sitting in diversity. *Semtek* rejects that approach.

Even if federal common law would adopt a state preclusion rule that applied a different preclusion rule to a state court judgment than to a federal diversity jurisdiction judgment, Plaintiffs have not shown that California law makes that distinction. In *Hardy v. Am.'s Best Home Loans*, 232 Cal. App. 4th 795 (2014), for example, the California Court of Appeals considered whether to give preclusive effect to a federal district court's dismissal of an action under Federal Rule of Civil Procedure 41(b) for failure to prosecute. The plaintiff argued that under California law collateral estoppel does not apply because the dismissal of the federal action was not a final judgment on the merits as under California law a dismissal for failure to prosecute is not a final judgment on the merits. *Id*. at 803. The court noted that "while the federal order dismissed both federal and state-law claims, the claims asserted in this action involve only state claims" and thus likened "the district court's dismissal of the state law claims [] to a federal court's dismissal in a diversity action." *Id*. at 806. As a result, "under *Semtek*, the preclusive effect of the district court's dismissal is determined under California law" and critically, "California law does not bar this action because the federal action was not an adjudication on the merits." *Id*. Thus, the court

applied California preclusion law—not federal law—to determine the preclusive effect of what it characterized as a federal diversity judgment.

In support of its holding, *Hardy* relied on *Semtek.*

> While federal common law . . . governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity, the federal Supreme Court concluded there was no need to establish a uniform federal rule since *state*, not federal, substantive law was at issue, explaining: "And indeed, nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court. This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits."

Hardy, 232 Cal. App. 4th at 805-06 (quoting *Semtek*, 531 U.S. at 508) (emphasis added). The court then applied *Semtek* to conclude that California's rule regarding the effect of a dismissal for failure to prosecute applied. *Hardy*, 232 Cal. App. 4th at 806. *Hardy* thus contradicts Plaintiffs' contention that California law applies the federal law controlling the preclusive effect of federal question judgments to determine the preclusive effect of federal diversity judgments. *See also Nathanson v. Hecker*, 99 Cal. App. 4th 1158, 1163 (2002) ("California gives full faith and credit to a final order or judgment of a federal court by follow[ing] the rule that the preclusive effect of a prior judgment of a federal court is determined by federal law, *at least where the prior judgment was on the basis of federal question jurisdiction*.") (emphasis added) (internal citation and quotation marks omitted; alteration in original); *Butcher v. Truck Ins. Exch*., 77 Cal. App. 4th 1442, 1452 (2000) ("California follows the rule that the preclusive effect of a prior judgment of a federal court is determined by federal law, *at least where the prior judgment was on the basis of federal question jurisdiction*.") (emphasis added).

This approach is consistent with how other circuits have applied *Semtek* to diversity jurisdiction judgments. *See, e.g., CSX Transportation, Inc. v. Gen. Mills, Inc*., 846 F.3d 1333, 1340 (11th Cir. 2017) (applying Georgia's claim preclusion rule because "federal common law borrows the state rule of [claim preclusion] to determine the preclusive effect of a federal judgment where the court exercised diversity jurisdiction."); *Medina-Padilla v. U.S. Aviation Underwriters, Inc*., 815 F.3d 83, 86 (1st Cir. 2016) (applying Puerto Rico's preclusion rule,

including to the question of the finality of the federal diversity jurisdiction judgment).

It is thus unsurprising that Plaintiffs do not cite, and the Court has not located, any California state court or Ninth Circuit case which applies federal preclusion rules to a federal diversity jurisdiction judgment. *Sosa v. DIRECTV, Inc*., considered whether a state court judgment barred a federal action which reached judgment after the state trial court judgment, but before resolution of the state court appeal. 437 F.3d. at 927. Applying California preclusion law to the state court judgment, the court held that the California judgment was not final for preclusion purposes until the resolution of the appeal. *Id.* It then applied the federal preclusion rule to the federal district court judgment and concluded that under the federal rule it was final upon the entry of the district court judgment. *Id.* at 928. Because the federal judgment was final before the state judgment, the state judgment did not bar the federal judgment. *Id.* The federal judgment, however, was based on federal question jurisdiction which was why the federal rule of finality applied. *Id.* at 927 (stating that the plaintiffs brought federal RICO claims). If the federal judgment had been based on diversity jurisdiction, then California preclusion law would have applied. *Semtek*, 531 U.S. at 508-09. Thus, *Sosa* does not support Plaintiffs' contention that under California law the federal rule of finality governs the preclusive effect of federal diversity jurisdiction judgments.

Jacobs v. CBS Broad., Inc., 291 F.3d 1173 (9th Cir. 2002), likewise does not support Plaintiffs' position. There, the Ninth Circuit addressed whether a Writers Guild of America (WGA) proceeding to determine who deserved participating writer credit barred a federal action. *Id.* at 1177. *Jacobs* did not analyze the preclusive effect of a federal judgment based on diversity jurisdiction. Thus, the *Jacobs* court's unexplained statement that "[u]nder California law, the preclusive effect of a prior *federal* judgment is a matter governed by federal law" is dicta and not a holding that under California law the federal law governing the preclusive effect of federal question judgments governs diversity jurisdiction judgments notwithstanding *Semtek's* holding to the contrary. *Id*.

The Court acknowledges that several district courts, including this one, have held that "[u]nder California law, the preclusive effect of a prior federal judgment is a matter governed by federal law" and therefore, "in applying California law, the federal final judgment rule applies".

Silvia v. EA Tech. Servs., Inc., No. 15-CV-04677-JSC, 2018 WL 3093454, at *3 (N.D. Cal. June 22, 2018); *see also Rutherford v. FIA Card Servs., N.A.*, No. 13-02934 DDP MANx, 2013 WL 12204309, at *3 (C.D. Cal. Sept. 30, 2013) ("Under California law, however, a federal judgment has the same preclusive effect in state court as it would in federal court."). Upon reflection, that holding was incorrect. In making that statement, the Court relied upon *Jacobs*. *Silvia*, 2018 WL 3093454 at *3 (quoting *Jacobs*, 291 F.3d at 1177). But, as explained above, that statement was unreasoned dicta. Further, in support of that statement, *Jacobs* cited the California Supreme Court's decision in *Younger v. Jensen*, 26 Cal.3d 397 (1980), that "[a] federal judgment has the same effect in the courts of this state as it would have in a federal court." *Younger*, 26 Cal.3d at 411 (internal citation and quotation marks omitted). *Younger*, however, addressed the preclusive effect of a federal judgment based upon federal question jurisdiction and thus says nothing about the preclusive effect of a federal diversity jurisdiction judgment. And *Younger*, in turn, relied upon *Levy v. Cohen*, 19 Cal. 3d 165, 172 (1977), which merely reasoned that "[f]ull faith and credit must be given to a final order or judgment of a federal court" and does not hold that the federal rule governing the preclusive effect of federal question judgments governs the preclusive effect of federal diversity jurisdiction judgments. Further, *Levy* involved a prior judgment from a bankruptcy case over which federal district courts have original and exclusive jurisdiction. *Levy*, 19 Cal. 3d at 172–73. Thus, neither *Younger* nor *Levy* suggests that California law treats the preclusive effect of federal judgments based on diversity jurisdiction the same as federal judgments based on federal question jurisdiction. And, in any event, since *Younger* was decided, the United States Supreme Court has held that as a matter of federal common law, federal courts apply the state preclusion rules that govern state court judgments to federal diversity jurisdiction judgments. *Semtek*, 531 U.S at 508.

Joseph v. Am. Gen. Life Ins. Co., 495 F. Supp. 3d 953 (S.D. Cal. 2020), aff'd, No. 20-56213, 2021 WL 3754613 (9th Cir. Aug. 25, 2021), held that under California law the preclusive effect "of a prior federal court judgment is analyzed under federal standards" in the context of determining the preclusive effect of a federal diversity jurisdiction judgment. *Id.* at 958. In so holding, the court cited *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir. 1982).

Costantini, however, addressed the preclusive effect of a federal question judgment. *Id.* at 1200-01. The court held that state preclusion rules apply to the preclusive effect of federal question judgments. *Id.* at 1201. That statement of law, however, is clearly irreconcilable with Supreme Court precedent. *See Taylor*, 553 U.S. at 891. Further, in stating that California preclusion law governs the preclusive effect of a federal judgment (without distinguishing between federal question and federal diversity jurisdiction judgments), the court relied on *Younger*, 26 Cal. 3d at 411. As explained above, *Younger* considered the preclusive effect of a federal question judgment. Thus, *Joseph* does not persuade this Court that federal common law governing the preclusive effect of federal question judgments controls here.

Nor is the Court persuaded by Plaintiffs' suggestion that even if California preclusion law applies, under *Semtek's* carve out for "situations in which the state law is incompatible with federal interests" the Court could still consider its judgment final for purposes of issue preclusion. 531 U.S at 509. Plaintiffs argue that "federal courts have a legitimate interest in affording their judgments with immediate preclusive effect, particularly when doing so will conserve judicial resources and avoid duplicative litigation in another forum." (Dkt. No. 970 at 9.) Under *Semtek*, this Court must follow California's preclusion rules regarding finality. Further, to hold otherwise would hardly conserve judicial resources or avoid duplicative litigation; if the Ninth Circuit reverses the judgment, then the first trial and any subsequent cases which were tried after the application of issue preclusion would have to be retried. And if the Ninth Circuit affirms the jury's verdict in whole or in part then the judgment becomes final and issue preclusion will likely apply and thus shorten the trials of the remaining cases.

Accordingly, the Court concludes that California law governs all aspects of the issue preclusion analysis including the question of finality. Because the judgment entered following the jury's verdict is not final under California law, issue preclusion does not apply at this time.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for partial summary judgment is DENIED. As the Court stated at oral argument, there is an issue as to whether it makes sense to go forward with the second trial before the first judgment becomes final under California law. (Dkt. No. 951

at 17 (Chart arguing that "A legal quagmire will result if a second judgment based upon the preclusive effects of the first judgment cannot stand because the first judgment is reversed.").) *See Callahan, v. PEOPLECONNECT, Inc.*, No. 20-CV-09203-EMC, 2021 WL 5050079, at *5 (N.D. Cal. Nov. 1, 2021) (discussing the unavailability of preclusion when "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.") (internal citation omitted). Indeed, courts frequently stay cases where there is a pending appeal of a parallel or related action which could be dispositive, at least in part, of the federal action. *See Larsen v. City of Los Angeles*, No. 12-04392, 2012 WL 12887557, at *8 (C.D. Cal. Aug. 3, 2012) (staying a section 1983 action pending an appeal of the grant of the plaintiff's habeas petition invalidating his conviction); *Stafford v. Rite Aid Corp.*, No. 17-01340 AJB-JLB, 2020 WL 4366014, at *5 (S.D. Cal. July 30, 2020 ("staying proceedings pending the appeals of related cases will serve the interests of judicial economy and will help to clarify the issues and questions of law going forward"), reconsideration denied, 2020 WL 6018941 (S.D. Cal. Sept. 29, 2020); *see also Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.").

Accordingly, the parties are ordered to file separate statements by December 1, 2021 indicating their position regarding whether these consolidated related actions should be stayed pending Chart's appeal of the judgment in the first action. The Court sets a further video status conference for December 7, 2021 at 9:30 a.m.

This Order disposes of Docket No. 908.

IT IS SO ORDERED.

Dated: November 12, 2021

Jacqueline Scott Corley

JACQUELINE SCOTT CORLEY
United States Magistrate Judge